CHAPTER-V
CHAPTER: V
TORTIOUS LIABILITY OF
GOVERNMENT OF INDIA

BEFORE 1950:

1. The discussion of the tortious liability of the State in the preceding Chapter revealed that, although King was the head of the State in ancient Indian polity, he did not exercise absolute sovereign powers. He always held the law above him. He abided by the verdict of the King’s Court i.e. his court in legal matters. For the wrongs done by him, he subjected himself to penalties by way of expiation as per the procedure prevailed in those days. Compensation to the victims of tort was paid out of the State exchequer. Whether the servants, exercising their functions in discharge of their duties in pursuance of the law of the State, when they committed tort, were held liable is question. In other words, whether tortious liability was fixed on such government servants need to be known. So far such occurrences of making the Government servants liable for their tortious act in ancient India are not known, the servants absolutely obeyed the orders of the King and the King obeyed the law and acts of the servants were taken as King’s acts and the King was susceptible to tortious liability as stated supra. In that invited sense, the rule of liability of master and servant was satisfied and the tortious liability of the State for the wrongful acts of its servants in ancient India was fact.

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2. It is a historical fact that the ancient Indian legal system was highly developed system as could be observed from the ancient Hindu Shastras dating back to second and third century A.D. wherein the society was truly governed by law and the King was not immuned from legal liability. As expressed by a famous historian (Radha Bimod Pal : The History of Hindu law, 1958, P. 180, TLL 1930)\textsuperscript{1}, there was a majesty of law rather than the King. Law was the Supreme authority at that time and the King was no exception.

(1) \textbf{Muslim Rule in India and Rule of Law :}

3. The Muslims are known to have come to Indian in 1206 A.D. from Arabia. they became monarchs by virtue of their invasions. They wielded absolute power. However, there are examples on record which go to establish that, the subjects had successfully sued the rulers even under Islamic Law. (Ahmed, The Administration of Justice in Medialval India, 1941: R.C. Majumdar (Ed.)\textsuperscript{2}. The Delhi sultanate, 456, (1960)\textsuperscript{3}. equity was the corner stone of Justice in Islamic law whether it related to the grant of benefits or imposing of burdens. The combined effect of the principle of equality and power being a trust is to reinforce the idea of accountability of the Government to the people. "In a community of equals all are answerable to God. None can claim any privilege exempting him from such accountability. It can not be otherwise if all power is exercizable as a trust on behalf of the community. Then the

\begin{enumerate}
\item \textsuperscript{1} Radha Bimod Pal : The History of Hindu law, 1958, P. 180, TLL 1930
\item \textsuperscript{2} Ahmed, The Administration of Justice in Medialval India, 1941.
\item \textsuperscript{3} R.C. Majumdar (Ed.). The Delhi sultanate, 456, (1960).
\end{enumerate}

4. Islamic law does not recognize any discrimination on the ground of nobility. The Prophet Mohammed declared that "he would not hesitate in awarding the same punishment to his daughter Fatima as an ordinary thief if she committed theft," (Tahir Mohammed: The Islamic law on Human Rights, Islamic and Comparative law Quarterly, Vol. Nos. 1 and 2, 1984 p. 32 and 33), because the "rule of Law in its zeal and in pure sense, would be the order of the day in a true Islamic society. (Ibid P. 34).

5. The Islamic law regarded all equals irrespective of fact that one holds the highest office and the other not. An event may be recalled in this connection. Once, Omar, the second Caliph was summoned as a defendant to the Court of zaid Bin Thabit, the Khazi of Madina. As soon as the Khazi saw Omar, entering the room, he got up and vacated the seat. Thereupon Omar pointed out that it was the first act of injustice by the Khazi towards the plaintiff. The plaintiff had no evidence and Omar did not accept the claim. The plaintiff wanted to administer oath to Omar. On this, the Khazi intervened and said, he should not forget that Omar was Amirul-Momineen. Omar became

2. Islamic and Comparative law Quarterly, Vol. Nos. 1 and 2, 1984 p. 32 and 33

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angry and told Khazi that so Long as an ordinary citizen and Omar do not rank equal in his eyes, he was not fit to be appointed as Khazi (Syed Athar Hussain, The Glorious. Caliphate (Academy of Islamic Research and Publication, Lucknow, P.88)\textsuperscript{1}. This shows that the Islamic law could hold the ruler liable and the theory that the “King can do no wrong” and the “King cannot be sued in his own courts “ was not applicable in Islamic law.

6. In India, the Muslim invaders became rulers, established their absolute monarchy due to intervene squabbles of native rulers and due to effect of serfdom and submissiveness of the local people with the blind faith in divinity of the King “(S.M. Jaffar : Some Cultural Aspect of Muslim Rule in India p. 8 and 9)\textsuperscript{2}

7. Akbar, Sultan of Delhi, was regarded as an absolute monarch with unlimited powers, not bound any law, unrestricted by any ministerial check and not liable to any human authority. Under such circumstances, the issue of tortious liability of state was a remote question.

8. However, from the operation of Muslim Common Law, the King was no better than the humblest and poorest and he is answerable for his acts, (Some Cultural Aspects of Muslim Rule in India (1972) P. 10, 13)\textsuperscript{3}.

\textsuperscript{1} Glorious. Caliphate (Academy of Islamic Research and Publication, Lucknow, P.88.
\textsuperscript{2} S.M. Jaffar : Some Cultural Aspect of Muslim Rule in India p. 8 and 9
\textsuperscript{3} Some Cultural Aspects of Muslim Rule in India (1972)P.10,13

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9. Sultan Feroz had declared the liability of the State for claims brought and adjudged against it in the court (*M.B.Ahmed: Administration of Justice in Medieval India, 1941 p. 237*).¹

10. In Shersha's reign also, the state was not to have any privilege in matters of actions against it. (*M.B.Ahmed: Administration of Justice in Medieval India, 19410*).

10. Akbar encouraged by his proclamations just claimed against the Government servants. (*Ibid P. 237*).

11. Aurangzeb dismissed a subordinate Quazi for not maintaining impartiality. (*Ibid. P.88*)

12. Sometimes, the State had also to pay the fine, In 1490, the Quazi held the King liable to pay compensation when due to his mistake, in practicing archery a widow's son was wounded although the widow forgave him. The interesting aspect of the event was the Quazi had asked the King to pay the compensation or suffer the punishment. The King browing to Quazi turned towards the woman offering such a sum as would satisfy her. On the averment of the woman that she was satisfied with it, the case was dismissed. At this state, the King showed his hidden sword to Khazi and stated that he would have beheaded the Quazi in case he had failed to do justice. the King expressed his happiness because the Quazi did not hold

¹ *M.B.Ahmed: Administration of Justice in Medieval India, 1941 p. 237.* (99)
any authority superior to law. The Quazi swearing by the Almighty told that the King’s back would have turned black and blue by the scourge, in case he had failed to comply with the injunctions of the law. (*Widow Vs. King Ghias Ibid P. 254-246).¹

13. A Police Officer was adjudged guilty of wrongfully imprisoning a person and therefore liable to pay compensation (*State Vs. Shiguahdar Ibid P. 193)²

14. In one case, the State was held liable to pay damages to the heirs of the deceased for a wrongful order passed by the Government Khan Jehan against the deceased in a trial for a murder. (*Waquar Alamoir, Part-I pp.72,101).

15. Balban who established a strong Government is famous for his impartiality even in the matters relating to his Kith and kin and courtiers.

16. Malik Barbak, one of his Chief courtiers caused a servant to be scourged to death. One the complaint of his widow, he ordered Malik Barbak to be similarly flogged in her presence. (*Alhaj M.U.I.S. Jung: The Administration of Justice of Muslim Law 18th Ed. 1926, Reprint 1977 p.58).

¹ *Widow Vs. King Ghias Ibid P. 254-246.
² *State Vs. Shiguahdar Ibid P.193.
16. Md. Tuglaq enforced rule of vicarious liability on the village Muguddams to execute to death if they failed to produce the real murderers. (Ibid P.60).

19. In the reign of Shahjahan, the officers responsible to protect the property were held liable to compensate the owner of the property if it could not be recovered from the thief. (M.B. Administration of Justice in Medieval India p. 197).

20. The events cited supra throw some light on the accountability of the ruler and his servants responsible for the Governance of the country. The examples although not in practice, the rule of law can be deemed to case against the Government in comparison to modern democracies.

"BRITISH INDIA AND "RULE OF LAW"
Pre-1858 Position in British India:

21. The East India Company entered India as traders unlike first Muslims who had entered as invaders. In course of time, East India Company acquired enormous territory and began to exercise Governmental functions also. the Company was empowered by the British Parliament to make law and to carry on the administration of justice under various charters of 1600 to 1753. The Regulating Act, 1773 was a major step of British Parliament’s intervention in the company’s affairs. The Act

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1. M.B. Administration of Justice in Medieval India p.197.
made provision for establishment of Supreme Court of Kidocatire at Fort, william in Calcutta. It authorized the Supreme Court to exercise the adjudicator jurisdiction inter alia against any person in the service of the company. The Governor General and his Councilors Court. The Act made provision for the individual liability of the officers. Thus the "Rule of Law" germinated in the company's administration of justice in the wrongful not made vicariously liable. But Act did not immunize the Governor General and his Councilors from being tried and held liable in English Courts.

22. The functioning of the Supreme Court vis-a-vis the Supreme Council was full of strife and conflict, the former claiming wider jurisdiction over the Council's law officers. The Act of Settlement 1781 was passed to remove the defects of act of 1773. The Act made the provision denying the jurisdiction of the supreme Court over the judicial officers of the company including Governor General and his Council and granted immunity to them but the company's servants were amenable to the jurisdiction of the Supreme Court.

23. The Charter Act, 1833, provided that so long as the possession and Government of the territories were continued under the company, all persons and bodies politic would take the same suits, remedies and proceedings legal and equitable against the said company in respect of such debts and liabilities as aforesaid and the property would be held by the company in trust. Bengal Regulations 1793 also provided the same effects in its preamble.
24. The said Acts and Regulations laid down the law regarding the individual officers and company’s the company was held liable for illegal, acts of the Governor and his Councilors. (*Perry J. in Dakjee Dadajee Vs. The East India Co. 2 Morley’s Digest, 307 (1843) P. 323*).¹ Those laws were to strength parliamentary control over the company rather than to give right to the individuals over the company. However, had the cases arisen, the Rule of Law would have prevailed holding the company liable. (*Alen Gledhill : The republic of India, 2nd Ed. P.17*)²

**POST 1858 POSITION :-**

25. Theory of sovereign and non-sovereign functions emerged out after 1958. The vicarious liability of the Government was defined under the Government of India Act, 1858, Government of India Act, 1915 and the Government of India Act, 1935 in the same terms as that of East India company prior to the enactments of the said statues. The Government could have been held liable like a private employer and the “Rule of Law” could have set its strong foot from the early period in British India itself in the field of vicarious liability of the Government, but for the judicial interpretation of the provisions drifting away from the “Rule of Law”. Had the courts in British India adopted judicial activism in interpretation of the provisions of 1958 Act, the position agencies in India would have been settled long back paving way for establishing Rule of Law against the Sovereignty unequivocally.

¹. *Dakjee Dadajee Vs. The East India Co. 2 Morley’s Digest, 307(1843) P. 323.*
². *Alen Gledhill : The republic of India, 2nd Ed. P.17.*

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*Vs. Secretary of State (1861), 5 Bom. HCR APP 1*\(^1\) appears to be the first case decided under the government of India Act, 1858. It was a great Jolt to the Rule of Law in the field of vicarious liability of the Government. The principle of liability of the Government laid down in the above case still persists in the democratic Government. It has recognized the distinction between sovereign and non-sovereign functions of the State and laid down the law of Governmental liability only in case of injury caused by the Government servants in the Course of discharging non-sovereign functions of the State.

27. The facts of the case were, the servants of the plaintiff were traveling in a carriage from Garden Reach to Calcutta, same workmen of Government employed in Kidrapore dock yard were carrying heavy piece of iron for the repair of steamer. They were walking in the centre of the road. A coachman driving on the road showed down the carriage near the workmen. The workmen is a sudden confusion dropped the iron piece on the road. Showed down the carriage near the workmen. The workmen in a sudden confusion dropped the iron piece on the road. It created a clang and one of the horse being frightened forward and dashed against the iron piece and got injured. the small causes Court held the Government servants liable but referred the matter to the Supreme Court on the point whether

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1. *The peninsular and Oriental Steam navigation Co. Vs. Secretary of State (1861), 5 Bom. HCR APP 1*
the Secretary of State would be liable in the matter as an ordinary employer. The Calcutta Supreme Court held the Secretary of State liable for the negligent acts of the servants. Distinguishing sovereign from non-sovereign functions, the Chief Justice Peacock observed that the Secretary of State would be liable only if the negligence was caused by the Government servants in the discharge of non-sovereign functions i.e. the functions which could be carried on by any private individual. But the Secretary of State could not be liable if the wrong was occasioned by the servants of the Government in performing sovereign functions i.e. those functions which could be carried on only by a sovereign body and nobody else. Since maintaining a dock yard and repairing ships was a function which could be carried on by any private person and hence the Secretary of State was held liable. The Court further observed that the company would not be liable for any military or naval action or in seizing property as prize property. but it would have been liable for the wrongful acts done in navigating a rive or for repair of it.

28. The East India Company functioned in dual capacity. When they exercised sovereign functions duly delegated to them, they were not liable for the wrongful actions. But when they traded on their own account, for their own business and when they exercised powers without any delegation of sovereign rights, they were liable for their wrongful acts done in their
private and commercial capacity of the company. \(5\) Bom. H.C.R. A.P.P. I P.15\(^1\). So this limited extent “Rule of Law” could be said as operated. However, the action would not lie if an act is done or a contract is entered into in the exercise of powers called as sovereign powers, which means powers which could not lawfully exercised except by a sovereign or private individual duly delegated by sovereign to exercise them. \(5\) Bom. H.C.R. A.P.P. I, 14\(^2\). To this extent, the liability of the East India Company was not equal to the liability of other corporate bodies and to that extent, justice was also denied.

29. The Peninsular and Oriental case was not reported in Calcutta Journals although the case was far reaching importance. It was cited in \textit{Naraian Krishna and G.N.Collector of Bombay (1969 5 Bom.H.C.R. Oct. 1)}\(^3\). In this case, the Collector believing the property of the plaintiff to be the property of the Government claimed sovereign immunity. the High Court of Bombay approving the Judgment of lower court awarded damages applying the case of oriental steam Navigation Company.

30. Offertory, it is understood that the Secretary of State would be liable although the Queen would not since she could not have been used in her own courts, but the East India Company could have been, Sec. 65 of the Government of India

\[1.\ \textit{Bom. H.C.R. A.P.P. I, 14, 15}\]
\[2.\ \textit{Bom. H.C.R. A.P.P. I, 15}\]

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Act, 1858 provided the mode for enforcing the liabilities of the Company devolved upon the secretary of the state.

31. The East India Company could not have claimed any immunity from the suit available to the Crown in England as the King could not be guilty of personal negligence or misconduct and hence could not be responsible for the negligence of his servants. The Calcutta Supreme Court pointed out that in view of difficulties in getting redressal, the liability of the Secretary of State in place of East India Company was specially provided by Sec. 10 of 1833 charter. The view was based on the opinion of Gray C.J. in Bank of Bengal Vs. The East India Company (Bignell Rep. 120). In this case, he expressed the fact that company was invested with sovereign powers, did not make them sovereign. The court also pointed out therein that the liability of the Secretary of State was in no sense personal liability but had to be satisfied out of the resources of India.

32. The Supreme Court of Calcutta in an argument further observed the the Secretary of State in Council as regards his liability to be sued must be considered as the State or as Public Officer employed by the State. But the liability to be used depends on an express enactment in the 21st and 22nd Viet. 106 by which he is constituted a more nominal defendant for the purpose of enforcing payment out of the revenues of India of the debts and liabilities which have been incurred by the East India Company, which might have been incurred or

1. Bank of Bengal Vs. The East India Company (Bignell Rep. 120).

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contracted by the Government of India. The court further observed that the East India Company were not sovereigns and they were not public servants of the Government. The were a company to whom sovereign powers were delegated and they traded on their own account and for their own benefit and were engaged partly for the purpose of the Government and partly for their own without being delegated by the sovereign rights.

33. The Court finally concluded stating that the Secretary of State in Council for India is liable for damages occasioned by the negligence of servants in the service of the Government if the negligence is such as would render an ordinary employer liable.

34. Earlier to Peninsular and Oriental case, there was an important case in Dhackjee Dadjee Vs. The East India Company (Morley Digest 307 P.329 330, 1843).2 decided prior to the Government of India Act, 1858. In the above case it was made clear by the Court that by charter Act, 1833, no distinction has been made between that act committed by the company in its political capacity and in its commercial activities. The statues clearly provided the actions to be brought against the company for the torts and trespass committed by the servants of the company in India.

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2. Dhackjee Dadjee Vs. The East India Company (Morley Digest 307 P.329 330, 1843.)
35. In Dhakjee Dadajee case (Morley's Digest, 307 p. 329-330) 1943, the superintendent of Police committed trespass under a warrant issued by the Governor General in Council of India. The Governor is Council of Calcutta, Madras and Bombay had statutory immunity from being used. The company was held not liable for trespass because the acts of trespass was neither authorized nor ratified by the company. It was done under the authority of the Governor General in Council over which the company had no control.

36. Another important case decided by Madras High Court in Secretary of State Vs. Haribhanji (1882, 5 LR Mad. 273) worth mentioning in this connection.

37. The facts of this case were that during the transit of slat from Bombay to Madras port, due to enhancement of duty, the plaintiff had to pay the excess duty at Madras under protest. In an action by him to recover the excess amount paid by him two questions regarding the maintainability of the Suit arose for consideration. The first question was whether the defendant, appellant who was sovereign could be sued in his own courts. in this respect, the court held that the immunity enjoyed by the Crown in England did never extend to East India Company.

38. The second question related to the nature of the act. It was argued that since the realization of excise duty was a "sovereign Act", no action would lie for it. The court brushed

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1. Dhakjee Dadajee case (Morley's Digest, 307 p. 329-330) 1943
2. Secretary of State Vs. Haribhanji (1882, 5 LR Mad. 273)
aside the argument that the said function was a sovereign function identical with acts of the State. The Court held that the Suit was maintainable in municipal courts. The "act of State" was an act of political sovereign against another political sovereign and not against its own citizens as was manifest in the light of some illustrations given by Peacock C.L.in Peninsular Steam navigation Company Case.

39. In Haribhanji's case (1882) 5 L.R. Mad.273 ¹, it appears correct law was laid by Justice Sir Charles Turner and Justice Muthuswany Iyer. Had it been followed in latter decisions, the "Rule of Law" could have occupied a strong position in relations between Government and citizens on the point of liability of State. Yet in another case in Nobin Chander Dey Vs. Secretary of State (ILR 1 Cal.11)², the Government did a breach of contract in auction of excise shops by not granting license to the plaintiff and not returning the deposits made, therefor by the plaintiff. The Calcutta High Court held the auction of excise as a sovereign act and therefore, no action could lie. The Allahabad High Court expressed its doubts (in Kishanchand Vs. Secretary of State ILR 3 All. 29)³

40. In Forester Vs. Secretary of State (1872), 1 A. Suppl. Vol. P. 10⁴, the property of Begum Samroo who was a British subject at the time of her death was resumed by the Government. The Privy Council held the question of resumption cognizable in the Municipal Court as the act of the executive was within its territory against its own subject and it could not be said as an

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¹ Haribhanji's case (1882) 5 L.R. Mad.273.
² Nobin Chander Dey Vs. Secretary of State (ILR 1 Cal.11).
³ Kishanchand Vs. Secretary of State ILR 3 All. 29.
⁴ Forester Vs. Secretary of State (1872), 1 A. Suppl. Vol.P.10
sact of State. The importance of this decision was the exercise of sovereign power against its own subject can be questioned in the court of law. It is noticed that this case was decided subsequent to the decision of Peninsular and Oriental Steam Navigation Company case (5 Bom. H.C.R. A.P.P. 1)¹

41. Further, on liability of the Government Sec.32 of Government of India Act, 1915, may be perused which runs as follows:

1. The Secretary of State in Council may sue and be sued by the the name of Secretary of State in Council as a body corporate.
2. Every person shall have the same remedies against the Secretary of State-in-Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed”.

42. In Secretary of State for India in Council Vs. Moment (40 Ind. A.P.P. 48 (P.C.))², the decision relating to the provision in Act IV of 1898 (Burma) similar to Sec. 65 of the Government of India Act, 1858, was taken by the Privy Council holding that the suit for the wrongful interference with the plaintiff’s property in land lies against the East India Company. The Privy Council in this decision approved the principles enunciated in Oriental Steam Navigation Company case.

¹ Peninsular and Oriental Steam Navigation Company case (5 Bom. H.C.R. A.P.P. 1
² Secretary of State for India in Council Vs. Moment (40 Ind. A.P.P. 48 (P.C.)

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43. In *Secretary of State for India in Council Vs. A Cockraft* (ILR 39 Mad. 351; AIR 1915 Mad. 993)\(^1\), a claim was made against the Secretary of State relating to a carriage accident due to negligent stocking of gravel on a military road maintained by the public works Department. It was held that the Secretary of State would not be liable because the provision of road and its maintenance specially military road was an act in exercise of sovereign powers of the Government, which was not an undertaking to be carried on by private persons.

44. In *Secretary of State for India in Council Vs. Shree Gobinda CHOUDHARI* (ILR 59 cal. 1289: AIR 1932 Cal. 834)\(^2\), the Calcutta High Court held that suit for damages would not lie against the Secretary of State for misfeasance, negligence or omissions of duties of managers appointed by the court of Wards because the acts giving rise to the course of exercising their functions which could not be lawfully exercised otherwise than by the sovereign power. It is in this connection Ranking C.J. had observed that no action lay against the Secretary of State on the basis of "respondent Superior".

45. Sec. 176 of the Government of India Act, 1935, which lays down the law of Government liability needs to be perused in this connection. The section contains the following terms:

\(^1\) Secretary of State for India in Council Vs. A Cockraft (ILR 39 Mad. 351; AIR 1915 Mad. 993)

\(^2\) Secretary of State for India in Council Vs. Shree Gobinda CHOUDHARI (ILR 59 cal. 1289: AIR 1932 Cal. 834)
46. "The federation may sue or be used by the name of federation of India and provincial Government may sue or be sued by the name of the province and without prejudice to the subsequent provisions of the Chapter, may subject to any provisions which may, be made by the Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or be if this act had not been passed".


48. By and large, it is observed that the Indian courts in British India were reluctant to hold the Government liable either torts or in crimes, upholding the plaintiffs was their foremost concern. Let another case be examined in this case. In Omar Prasad Vs. Secretary of State (AIR 1937 Lah. 572: ILR (1937 18 Lah. 380) 1, a theft was committed in the house of Oma Prashad, a retired subordinate Judge and considerable amount of property was stolen. The Police recovered property. At the conclusion of the trial, the Magistrate ordered the property which was in Police custody to be returned to Oma Prashad. Afterwards a case under sec. 411 I.P.C. was started against

father of one of the convicts and he was detained in that case. Throughout the trial, the property remained in the custody of the Police. Afterwards, The district Magistrate was informed that the property was lost. Oma Prashad brought the suit for recovery of the property of alternatively, its price as assessed at Rs. 1,500/- to be paid to him.

49. The suit was resisted inter alia that the secretary of state was not liable to return the property or refund its price in law and in equity and the plaintiff had no cause of action. During the trial, it was found that one Humayun Akhtar incharge of Malkhana had absconded with property and the subordinate Judge held the Secretary of state for India in Council liable to make good the loss caused by one of his servants. In appeal, the District Judge held that the plaintiff had not disclosed any cause of action against the Secretary of State. The matter was referred to the divisional Bench on account of importance of the Matter. The Defence Counsel argued that the act by which property came into the possession of the Secretary was a sovereign act which was an “act of State” against which no suit lies. The argument was rejected since the property was taken under the colour of legal title. The liability arose under Cr.P.C. The Court held, a private employer of Humayun Akhtar could not be made liable in the same circumstances of embezzlement and therefore, the Secretary of State would also not be liable. The Court referred to Halsbury’s Laws of England which stated as under:

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50. "Where however, the commission of the crime has the effect of sovereign the connection between the master and his servant or otherwise falls outside the scope of the Seryant's employment, the master is not liable. (Para 598, Vol.20) The Court also referred to Cheshire Vs. Bailey (1905, 1 K.B. 237 : LT 142: 74 LJKB 176, 53 W.R. 322; 21 TLR 130)\(^1\) in which the defendant was held not responsible for criminal act of his servant as it had not been done within the scope of employment.

51. The court also referred to British Banking Co. Ltd. Vs. Charnwood Forest Rly. Co. (1887, 18 Q.b. d. 714 ; 56 LJQB 449; 57 LT 833, 35 WR 590, 52 JP 150)\(^2\). In this reference, the court observed:

52. "A Principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant".

53. The court finally ruled that the Trust Act does not apply to the case and it was also not a case of bailment and hence held that the Crown was not liable.

54. The pre-constitution position immunizing the Secretary of State for the acts arising in exercise of sovereign functions as discussed above, developed as law antagonistic to the "Rule of Law". This trend continued by the latter interpretations and made a safe entry into the post constitution period also.

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The interpretation made by the Judiciary during the pre-constitution period in respect of the immunity of the Secretary of State for the sovereign functions of the State also appears contrary to the statutory provision. On closer scrutiny, it is manifest that the law as interpreted in *Hari Bhanji's Case (1882, 5 L.R. Mad.273)*\(^1\) not only conforms to the "Rule of Law justice, equity and good conscience, but also in consonance with the statutory provisions.

55. As observed from the decided cases in England and in Indian mentioned in the previous paragraphs, the doctrine of sovereign immunity emanating from the Divine Right of Kings that King can do no wrong as prevailed in England did not apply to the East India company before 1858 when the administration was taken over and assumed by the Queen. With the advent of the British and after the assumption of common law in India began. The Secretary of State claimed the claimed the common law immunity of the Crown claiming himself to be considered as a state not merely a nominal defendant and that was declined by the court as was seen in the Peninsular and Oriental Steam Navigation's case.

56. In the course of discussion in various cases mentioned Supra, it is not that the distinction was laid down between sovereign and non-sovereign functions of state and the distinctions so laid were subjects of dispute. Divergent interpretations were given, one that the liability of the State was the same as that of a individual except where the act injuring is an "Act of State" i.e. the liability existed for all acts except those which were acts of state. There was a broad view

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\(^1\) *Hari Bhanji Case (1882, 5 L.R. Mad.273)*
expressed in Hari Bhanji's case. The other view is narrow one, which is based on the distinction between sovereign and non-sovereign functions. That is, the Secretary of state is liable for acts which could be performed by private persons only (Nobin Chander's case). Consequently, the second view or a theory of doubtful validity was made to work in favour of the State granting concessions and relaxations to various Governmental relaxations that the State is not vicariously liable. *(Shiv Bhajan Vs. Secretary of State (1911) Mad. 351, 28 Bom. 314)*\(^1\) for the tortious acts of his servants where the act was done under statutory authority or where the act though performed in course of employment was not ratified by the Government or where the Government did not derive any benefit out of the tortious act of its servants, *(M.C. Inerny Vs. Secretary of State, 1911, 38 Cal. 797)*\(^2\). This uncertainty state of affairs continued till 1947 i.e. for about nine decades, In P & O case (1868) 5 Bom. H.C.R. A.P.P. 1) the distinction of Sovereign and non-sovereign powers as laid down were cited in Hari Bhanji's case and the Madras High Court flatly refused to follow the distinction.

57. Thus the pre-independent cases have not been successful in finding and following the correct interpretation and spirit on the decision of the P&O case, which remained in position of uncertainty for some time more and even after India became free and independent democratic republic.

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2. *M.C. Inerny Vs. Secretary of State, 1911, 38 Cal. 797.*

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